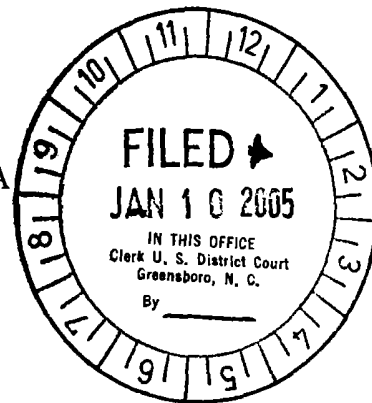


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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

Case No. **1:05-cv-00027**



VICTORIA T. McPHATTER, et al., )  
)  
Plaintiffs, )  
)  
vs. )  
)  
JEFFREY LIN SWEITZER, et al., )  
)  
Defendants. )  
\_\_\_\_\_ )

**MEMORANDUM OF LAW IN  
SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS**

Defendants Jeffrey Lin Sweitzer, Matthew James Muller, Sr., Samuel Boyce Rankin, Randy Matz, Joseph Zentner and Citigroup Global Markets Inc., f/k/a Salomon Smith Barney Inc. ("Salomon Smith Barney") (collectively, "Defendants"), by and through counsel, file this Memorandum of Law in Support of their Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**I. Introduction**

In this putative class action, Plaintiffs claim that Defendants induced the Plaintiffs to retire from their jobs at BellSouth by promising certain rates of return on their retirement funds which were to be invested with Defendants. Plaintiffs claim that they were damaged as a result of the failure of their investments to produce the returns that Plaintiffs allege they were led to expect by various alleged oral and written representations made by Defendants. As demonstrated below, Plaintiffs' claims, as detailed in the deposition of the class representative, are based on the alleged misrepresentations and omissions of material fact and the use of manipulative or deceptive devices or contrivances in connection with the purchase or sale of

covered securities. Therefore, Plaintiffs' claims are subject to the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), which mandates that Plaintiffs' class claims must be dismissed.

## **II. Plaintiffs' Claims**

This is a putative class action by numerous clients of Defendants who allege that the transactions in their investment accounts failed to generate rates of return that employees of Salomon Smith Barney had allegedly represented would be achieved. *See* Amended Complaint (herein "Complt.") ¶ 107. In particular, Plaintiffs claim that Defendants promised that if the Defendants were entrusted with the Plaintiffs' retirement funds for investment purposes, then the Defendants would earn "an asset growth rate" of 12%. According to the Plaintiffs that representation was made both orally and through a document entitled "Income Distribution Analysis." The Plaintiffs also allege that the Defendants used a document entitled "Hypothetical Asset Allocation" in connection with the alleged misrepresentations and that those documents were used together to solicit an investment in specific covered securities. Based on these assertions, and others, the Amended Complaint purports to assert common law claims of breach of fiduciary duty, negligence, negligent misrepresentation, breach of contract, "aggravated breach of contract," and equitable estoppel, as well as a statutory claims under North Carolina's Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1 *et. seq.*, and North Carolina's Racketeer Influenced and Corrupt Organizations Act, N.C.G.S. § 75D-1 *et. seq.*

At their core, Plaintiffs' claims are premised on the assertion that Defendants made materially false and misleading statements concerning the anticipated rates of growth and income that would be generated in their accounts as a result of their securities transactions with Defendants. Plaintiffs have sought throughout the pendency of this case to avoid the application

of the securities laws by reciting that the misrepresentations about which they are complaining were not made in connection with the purchase or sale of securities. In a previous removal of this case, after oral argument on the Plaintiffs' motion to remand for lack of jurisdiction, the Court determined that the allegations in the Complaint did not assert that the Plaintiffs bought or sold covered securities in reliance on any alleged misrepresentations, that the involvement of securities was merely tangential to the claims asserted and that there was no allegation that Defendants provided financial advice as to the purchase or sale of covered securities.

Discovery that has occurred in the case, after remand, now refutes those conclusions and demonstrates that the claims are in fact preempted by SLUSA. As detailed below, Hugh Q. Smith, one of the putative class representatives has testified that the document about which the Plaintiffs complain, the "Income Distribution Analysis" containing the 12% reference, was used by the Defendants when soliciting the purchase of covered securities. Mr. Smith also testified that the Defendants made representations and failed to disclose other facts which would have made the Defendants' representations not misleading in connection with the purchase and sale of securities. He further testified that he relied on those representations in agreeing to authorize the purchases and sales that occurred in his accounts. Based on Mr. Smith's testimony, the claims that are asserted in the Amended Complaint are preempted by SLUSA.

### **III. The Securities Litigation Uniform Standards Act of 1998**

The Private Securities Litigation Reform Act of 1995 (the "Reform Act") enacted certain pleading and procedural requirements to guard against, in part, the potential for abuse in connection with meritless class action securities fraud claims. *Dudek v. Prudential Secs., Inc.*, 295 F.3d 875, 877 (8th Cir. 2002). An unintended result of the Reform Act was to "drive many would-be plaintiffs to file their claims in state court, based on state law, in order to circumvent

the strong requirements established by the statute.” *Id.* Congress responded by enacting the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”)<sup>1</sup> to “prevent plaintiffs from seeking to evade the protections that federal law provides against abuse litigation by filing suit in state, rather than federal, courts.” *Id.*; *see also* H.R. Conf. Rep. No. 105-803 at 14-15 (1998). SLUSA amended the Securities Act of 1933 and the Securities Exchange Act of 1934 to preempt certain state law claims and to provide for the removal to federal court, and subsequent dismissal, of class actions asserting those claims. *Id.* In enacting SLUSA, Congress evinced a clear intent toward broad application of the Act. *Zoren v. Genesis Energy, L.P.*, 195 F.Supp.2d 598, 603 (D.Del. 2002) (citations omitted).

The essential purpose of SLUSA is to prevent class action plaintiffs from making an end run around the pleading requirements and procedural protections that the Reform Act provides in securities fraud cases by assuring that such claims be brought in federal court, pursuant to federal securities laws. “It did this by making federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and by mandating that such class actions be governed exclusively by federal law.” *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001) (emphasis added) (citing 15 U.S.C. §§ 77p(b)–(c)).

SLUSA mandates that all cases falling within its purview are both removable to federal court, and subject to automatic dismissal. 15 U.S.C. §§ 77p(b)–(c); 15 U.S.C. §§ 78bb(f)(1)–(2). Under SLUSA, “no covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging (a) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (b) that the defendant used or employed any manipulative or deceptive

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<sup>1</sup> SLUSA became effective on November 3, 1998 and it applies retroactively to conduct that occurred before its enactment. *W.R. Huff Asset Management Co., LLC v. Kohlberg Kravis Roberts & Co. L.P.*, 234 F.Supp.2d 1218, 1226 (N.D. Ala. 2002).

device in connection with the purchase or sale of a covered security.” 15 U.S.C. §§ 77p(b) and 78bb(f)(1). SLUSA effects a complete preemption of state law in this area. See *Franchise Tax Bd. of Cal v. Construction Laborers Vacation Trust for Southern Calif.*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). If SLUSA applies to a claim, it is mandatory that the claim be dismissed. 15 U.S.C. §§ 77p(b)-(c); 15 U.S.C. §§ 78bb(f)(1)-(2).

SLUSA preempts a claim (making it subject to removal and automatic dismissal) where four conditions are met: (1) the underlying suit is a “covered class action”; (2) the claim is based on state law; (3) the claim concerns a “covered security”; and (4) the plaintiff alleges “a misrepresentation or omission of material fact,” or “a manipulative or deceptive device or contrivance, in connection with the purchase or sale of a covered security.” See 15 U.S.C. § 77p(b); 15 U.S.C. § 78bb(f)(1). The court should focus on the *substance* of the claim and not the Plaintiffs’ characterization of the claim. *Denton v. H & R Block Fin. Advisors, Inc.*, 2001 WL 1183292, \*3 (N.D. Ill. October 4, 2001). If each of these elements is present, a complaint should be dismissed. *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 231 (D.N.J. 2000). As demonstrated below, because Plaintiffs’ claims meet each of these criteria, the Complaint should be dismissed.

**A. Plaintiffs’ Claims Constitute a Covered Class Action.**

This action is a “covered class action” within the meaning of 15 U.S.C. § 77p(f)(2)(A) and/or 15 U.S.C. § 78bb(f)(5)(B). A “covered class action” is defined under SLUSA as:

(i) any single lawsuit in which-

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

15 U.S.C. § 78bb(f)(5)(B). Plaintiffs are seeking the recovery of damages on behalf of themselves and an alleged class of approximately 300 other similarly situated Salomon Smith Barney clients, and Plaintiffs allege that questions of law and fact common to the members of the class predominate over any questions affecting only individual persons or members. Plaintiffs' suit is therefore a "covered class action."

**B. Plaintiffs' Claims are Based on State Law.**

Next, Plaintiffs' claims are unquestionably based on state law. Plaintiffs have alleged the following North Carolina common law and statutory causes of action breach of fiduciary duty, negligence, negligent misrepresentation, breach of contract, aggravated breach of contract, and equitable estoppel, as well as a statutory claims under North Carolina's Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1 *et. seq.*, and North Carolina's Racketeer Influenced and Corrupt Organizations Act, N.C.G.S. § 75D-1 *et. seq.* Claims such as the ones asserted by Plaintiffs routinely have been found to be preempted by SLUSA. *Behlen v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 311 F.3d 1087, 1095 (11<sup>th</sup> Cir. 2002) (breach of contract, breach of fiduciary duty, and negligence claims properly dismissed).

**C. Plaintiffs Allege Material Misrepresentations or Omissions of Material Fact, or a Manipulative Device or Contrivance.**

As reflected in the testimony of Hugh Q. Smith ("Smith"), one of the putative class representatives, the claims asserted by Plaintiffs are based on the allegation that misrepresentations or omissions of material fact were made by employees of Salomon Smith

Barney and that employees of Salomon Smith Barney used or employed a manipulative or deceptive device or contrivance.

On December 13 and 14, Defendants deposed Smith, one of the putative class representatives. During the course of that deposition, Smith testified both that (1) he was solicited to invest his retirement savings in mutual funds—covered securities—and (2) he is seeking to recover the investment losses that resulted from those representations in this suit. The relevant testimony is as follows:

- Q. Now, you understood that in order to get you -- your words, get you 12 percent, Mr. Sweitzer had to invest your money, is that correct? You have to say yes or no.
- A. Yes.
- Q. And you understood that Exhibit No. 302 and Exhibit No. 303<sup>2</sup> were his recommendations about how he was going to invest your money to get 12 percent, is that right?
- A. Yes.
- Q. And that is, in fact, how Mr. Sweitzer did invest your money, isn't it?
- A. Yes.
- Q. And he invested your money over time using a method called dollar cost averaging, didn't he?
- A. I don't have a clue.
- Q. Did you ever review your statements to determine how Mr. Sweitzer actually invested your money once you delivered it to him?
- A. I looked at my statements to see that it was invested that way, yes. I saw the funds on my 3 monthly statements, yes.
- Q. And he did invest the money as he recommended on Exhibit No.'s 302 and 303, didn't he?
- A. Yes, sir.
- Q. And you agreed with those investments, didn't you?
- A. Yes, sir.
- Q. And during this meeting on December 15th, Mr. Sweitzer had solicited you to invest in those funds, hadn't he, when he used this sheet?
- A. Yes.
- Q. And that solicitation was done in connection with Exhibit No. 301, which is the income distribution analysis at nine percent, that solicitation was done in connection with exhibit -- the second page of Exhibit No. 301, which is the six percent distribution sheet, and it was done in connection with Exhibit No.'s 302 and 303, wasn't it?

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<sup>2</sup> The exhibits to Smith's deposition, Exhibits 301, an Income Distribution Analysis for Mr. Smith, and Exhibits 302 and 303, a Hypothetical Asset Allocation, are attached hereto collectively as Exhibit B.

- A. When you say connection --
- Q. He was using these documents when he solicited your investments, wasn't he?
- A. Yes, sir, he was using these documents.
- Q. And you understood the purpose of him using these documents was to solicit your investment in these funds, is that right?
- A. Yes, sir.
- Q. And that is, in fact, how you invested your funds, is that right?
- A. Yes, sir.
- Q. And the reason for this lawsuit is your complaining about the return that you received on these investments, is that right?
- A. Yes, sir.
- Q. You expected to get 12 percent, is that correct?
- A. Yes, sir.
- Q. And you didn't get it?
- A. Yes, sir.
- Q. And that's why you have sued Mr. Sweitzer and Salomon Smith Barney, is that right?
- A. Yes, sir.

12/13/04 Deposition of Hugh Q. Smith ("Smith Depo."), pp. 114-16. Those excerpts from Smith's deposition are attached as Exhibit A.

In his testimony, Smith is referring to the income distribution analysis (Ex. 301), three versions of which were attached to the Complaint. In addition, he is reviewing a document entitled "hypothetical asset allocation" (Ex. Nos. 302 and 303) which showed the exact investments that Mr. Smith made. He testified that he received and reviewed the hypothetical asset allocation documents at the same time that he reviewed the income distribution analysis document. In an attempt to avoid SLUSA preemption, Plaintiffs did not attach any version of the hypothetical asset allocation to the Complaint or the Amended Complaint. Even though, as the Court previously noted, the income distribution analysis (Ex. 301) includes a disclaimer that that document alone does not constitute a solicitation for the purchase or sale of any securities, Smith testified that the income distribution analysis and the hypothetical asset allocation documents together were used for the purpose of soliciting an investment in specific mutual funds. That testimony unequivocally demonstrates that the Court's initial ruling, however, was made without



the benefit of a complete view of the salient facts. Based on his testimony, it is unmistakable that Smith purchased mutual funds based on Defendants' solicitations and now seeks to recover based in significant part on how those funds performed. Therefore, this case is a covered class action.

**D. Plaintiffs' Allegations are in Connection with the Purchase or Sale of Covered Securities.**

**1. The statements about which Plaintiffs complain were made in connection with the purchase or sale of securities.**

The representations and advice about which Plaintiffs complain were made in connection with the purchase or sale of securities. Plaintiffs claim that "based on the advice . . . received from the defendants,"<sup>3</sup> they deposited assets with Salomon Smith Barney and opened accounts there, including "investment accounts" and tax-deferred accounts in which the procedure for making early withdrawals set forth in 26 U.S.C. § 72(t) was utilized. Amended Compl. ¶ 175. Plaintiffs allege that the performance of these accounts did not meet the projections given to Plaintiffs by Defendants. As Smith claimed during his deposition, the Plaintiffs assert that they did not receive the return which was represented to them when they were solicited to open their accounts and to purchase securities. At the same time that the alleged misrepresentation was made concerning the 12% rate of return, the Defendants are alleged to have presented Smith with the "Hypothetical Asset Allocation" which demonstrated how the "misleading" 12% return would be achieved through the purchase of covered securities. Mr. Smith alleges that he was solicited to purchase those covered securities, and his funds were in fact used to purchase covered securities.

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<sup>3</sup> The allegations as to causation, and misrepresentation, for each of the 51 Plaintiffs are essentially the same and appear at Compl. ¶¶104-152.

SLUSA does not define the phrase "in connection with the purchase or sale of a covered security." The Supreme Court has not interpreted this phrase in the context of the SLUSA, but has interpreted the identical phrase as it appears in Rule 10b-5, which implements section 10(b) of the 1934 Act. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737- 38, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). Congress intended the phrase "in connection with" to have the same meaning under the SLUSA that it has under Rule 10b-5, because the SLUSA was enacted as an amendment to the 1933 and 1934 Acts. *Riley*, 292 F.3d at 1342-43; *see also Green v. Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002).

As the Supreme Court has stated, the "in connection with requirement should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC v. Zandford*, 535 U.S. 813, 122 S. Ct. 1899, 1903, 153 L. Ed. 2d 1 (2002) (internal quotations omitted), quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L. Ed. 2d 741 (1972)<sup>4</sup>. The Supreme Court has stated that to satisfy the "in connection with" element, it is enough that a security buyer or seller suffered an injury as a result of deceptive practices touching its purchase or sale of securities. *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 12-13, 92 S. Ct. 165 169, 30 L. Ed. 2d 128 (1971). In other words, "it is enough that the scheme to defraud and the sale of securities coincide." *Zandford*, 533 U.S. 813, 122 S. Ct. at 1904, 153 L. Ed. 2d 1. There is no requirement that the misrepresentation must concern the value of a particular security in order to run afoul of the Act. *Zandford*, 535 U.S. 813, 122 S. Ct. at 1903, 153 L. Ed. 2d 1.

## **2. Plaintiffs' claims involve covered securities**

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<sup>4</sup> The Fourth Circuit has previously taken the approach that only misrepresentations concerning the value of stock meet the "in connection with" requirement, *See Hunt v. Robinson*, 852 F. 2d 786, 787 (1988). In light of *SEC v. Zandford*, however, that interpretation should be rejected in this case.

The misrepresentations that Plaintiffs allege relate to the performance of covered securities. SLUSA adopts the definition of “covered security” given in 15 U.S.C. §77r(b).<sup>5</sup> 15 U.S.C. §§ 77p(f)(3) and 78bb(f)(5)(E). Securities listed on the NYSE, the NASDAQ National Market System, and mutual funds registered under the Investment Company Act of 1940 are among the securities within the class of “covered securities” under SLUSA.

Even though Plaintiffs focus on “financial consulting” and “financial planning” rather than their actual Salomon Smith Barney accounts, Mr. Smith's testimony demonstrates that the alleged misrepresentation concerned a covered security. As a result of Defendant's advice, he testified that he purchased various mutual funds, as detailed on the "Hypothetical Asset Allocation." See Exhibit A, and Exhibit 302 and 303 from Mr. Smith's deposition. Those mutual funds are covered securities within the meaning of SLUSA.

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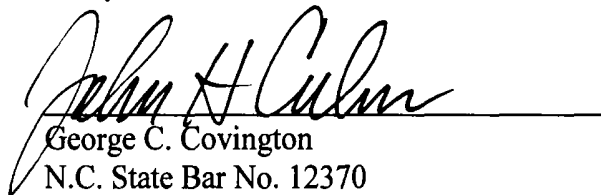
<sup>5</sup> 15 U.S.C. § 77r(b) Covered securities. For purposes of this section, the following are covered securities:

- (1) Exclusive Federal registration of nationally traded securities. A security is a covered security if such security is –
  - (A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the NASDAQ Stock Market (or any successor to such entities);
  - (B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or
  - (C) is a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).
- (2) Exclusive Federal registration of investment companies. A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

Conclusion

Plaintiffs' state law class action claims stem from misrepresentations concerning the purchase or sale of covered securities and as such are exactly the type of claims sought to be curtailed by the passage of SLUSA. Defendants respectfully requests that this Court dismiss Plaintiffs' class claims, and grant such other and further relief as is just and appropriate.

Respectfully submitted this 10th of January, 2005.

A handwritten signature in black ink, appearing to read "John H. Culver", is written over a horizontal line.

George C. Covington

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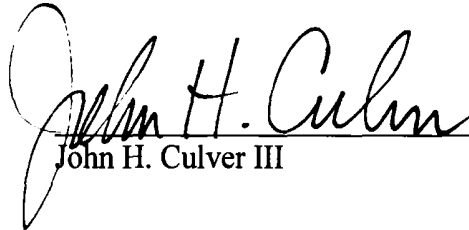
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **Memorandum of Law in Support of Motion to Dismiss** was served upon all other parties to this action by depositing a copy of the same in the United States mail, first-class postage prepaid, addressed as follows:

Robert N. Hunter  
101 West Friendly Avenue, Suite 500  
Greensboro, NC 27401

Tracy Pride Stoneman  
301 Snowcrest  
Westcliffe, CO 81252

This 10th day of January, 2005.

  
\_\_\_\_\_  
John H. Culver III

ATTACHMENT/EXHIBIT \_\_\_\_\_

1 STATE OF NORTH CAROLINA GENERAL COURT OF JUSTICE

2 COUNTY OF GUILFORD SUPERIOR COURT DIVISION

3 03 CVS 3555

4 - - - - -X

5 VICTORIA T. MCPHATTER, ALEXIS :

6 M. SCHOENTHAL and HUGH Q. SMITH, :

7 on behalf of themselves and :

8 others similarly situated, :

9 Plaintiffs, :

10 v. :

11 JEFFREY LIN SWEITZER, :

12 JAMES MULLER, SR., SAMUEL BOYCE :

13 RANKIN, RANDY MATZ, JOSEPH :

14 M. ZENTNER, JR., and SALOMON, :

15 SMITH, BARNEY, INC., et al., :

16 Defendants. :

17 - - - - -X

18 VOLUME I

19 Video deposition of HUGH Q. SMITH

20 (Taken by Defendants)

21 Charlotte, North Carolina

22 December 13, 2004

23 Reported by: Andrea L. Nobrega

24 Court Reporter

25 Notary Public

COPY

Reported By: Andrea L. Nobrega

Huseby, Inc. Charlotte, 1230 West Morehead Street, Suite 408, Charlotte, NC, 28208, 704-333-9889

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18 ALSO PRESENT:

19 MARTIN NOBREGA, Videographer

20 JEFFREY SWEITZER

21 MATTHEW MULLER

22

23

24

25



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1           A.    I don't remember him telling about those   11:46:01  
2   fees.  I'm not saying he didn't, but I don't       11:46:03  
3   remember it.                                               11:46:08

4           Q.    You just don't remember it?               11:46:08

5           A.    No, sir.                                     11:46:10

6           Q.    Now, you understood that in order to get   11:46:12  
7   you -- your words, get you 12 percent, Mr. Sweitzer   11:46:16  
8   had to invest your money, is that correct?  You       11:46:20  
9   have to say yes or no.

10          A.    Yes.                                         11:46:25

11          Q.    And you understood that Exhibit No. 302   11:46:25  
12   and Exhibit No. 303 were his recommendations about   11:46:30  
13   how he was going to invest your money to get 12       11:46:35  
14   percent, is that right?                                 11:46:37

15          A.    Yes.                                         11:46:38

16          Q.    And that is, in fact, how Mr. Sweitzer   11:46:39  
17   did invest your money, isn't it?                       11:46:43

18          A.    Yes.                                         11:46:45

19          Q.    And he invested your money over time       11:46:47  
20   using a method called dollar cost averaging, didn't   11:46:51  
21   he?                                                         11:46:55

22          A.    I don't have a clue.                       11:46:55

23          Q.    Did you ever review your statements to    11:46:57  
24   determine how Mr. Sweitzer actually invested your    11:47:00  
25   money once you delivered it to him?                   11:47:05

Reported By: Andrea L. Nobrega

Huseby, Inc. Charlotte, 1230 West Morehead Street, Suite 408, Charlotte, NC, 28208, 704-333-9889

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1           A.    I looked at my statements to see that it   11:47:09

2   was invested that way, yes.  I saw the funds on my   11:47:12

3   monthly statements, yes.                                   11:47:22

4           Q.    And he did invest the money as he       11:47:22

5   recommended on Exhibit No.'s 302 and 303, didn't   11:47:22

6   he?                                                           11:47:25

7           A.    Yes, sir.                                   11:47:25

8           Q.    And you agreed with those investments,   11:47:26

9   didn't you?                                               11:47:28

10          A.    Yes, sir.                                   11:47:29

11          Q.    And during this meeting on December 15th, 11:47:32

12   Mr. Sweitzer had solicited you to invest in those   11:47:35

13   funds, hadn't he, when he used this sheet?       11:47:38

14          A.    Yes.                                       11:47:41

15          Q.    And that solicitation was done in       11:47:43

16   connection with Exhibit No. 301, which is the       11:47:45

17   income distribution analysis at nine percent, that   11:47:50

18   solicitation was done in connection with exhibit -- 11:47:54

19   the second page of Exhibit No. 301, which is the   11:47:58

20   six percent distribution sheet, and it was done in   11:48:01

21   connection with Exhibit No.'s 302 and 303, wasn't   11:48:04

22   it?                                                       11:48:08

23          A.    When you say connection --               11:48:11

24          Q.    He was using these documents when he   11:48:13

25   solicited your investments, wasn't he?               11:48:15

Reported By: Andrea L. Nobrega

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1	A. Yes, sir, he was using these documents.	11:48:18
2	Q. And you understood the purpose of him	11:48:20
3	using these documents was to solicit your	11:48:22
4	investment in these funds, is that right?	11:48:25
5	A. Yes, sir.	11:48:28
6	Q. And that is, in fact, how you invested	11:48:28
7	your funds, is that right?	11:48:30
8	A. Yes, sir.	11:48:31
9	Q. And the reason for this lawsuit is your	11:48:35
10	complaining about the return that you received on	11:48:38
11	these investments, is that right?	11:48:41
12	A. Yes, sir.	11:48:42
13	Q. You expected to get 12 percent, is that	11:48:43
14	correct?	11:48:45
15	A. Yes, sir.	11:48:46
16	Q. And you didn't get it?	11:48:46
17	A. Yes, sir.	11:48:47
18	Q. And that's why you have sued Mr. Sweitzer	11:48:48
19	and Salomon Smith Barney, is that right?	11:48:49
20	A. Yes, sir.	11:48:51
21	Q. And if you had, in fact, gotten 12	11:48:52
22	percent, you would not have brought this lawsuit,	11:48:54
23	would you?	11:48:57
24	A. There is other things involved other than	11:49:00
25	this investment -- in this lawsuit for me. I'm	11:49:03

Reported By: Andrea L. Nobrega

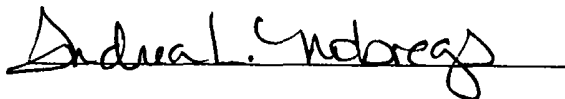
Huseby, Inc. Charlotte, 1230 West Morehead Street, Suite 408, Charlotte, NC, 28208, 704-333-9889

## 1 CERTIFICATE OF REPORTER

2  
3 STATE OF NORTH CAROLINA)

4 COUNTY OF MECKLENBURG )

5 I, Andrea L. Nobrega, the officer before  
6 whom the foregoing deposition was taken, do hereby  
7 certify that the witness whose testimony appears in  
8 the foregoing deposition was duly sworn by me; that  
9 the testimony of said witness was taken by me to  
10 the best of my ability and thereafter reduced to  
11 typewriting under my direction; that I am neither  
12 counsel for, related to, nor employed by any of the  
13 parties to the action in which this deposition was  
14 taken, and further that I am not a relative or  
15 employee of any attorney or counsel employed by the  
16 parties thereto, nor financially or otherwise  
17 interested in the outcome of the action.

18 

19 ANDREA L. NOBREGA

20 Court Reporter and Notary  
21 Public in and for North  
22 Carolina.

23  
24  
25 My commission expires: 11-25-06

ATTACHMENT/EXHIBIT \_\_\_\_\_

### 1. Client Profile

**Hugh and Linda Smith**

Date 1999  
Age 51

The information on this form was obtained from sources we believe reliable, before we sold securities to you. Neither the information nor any opinion expressed constitutes a solicitation by us of the purchase or sale of any securities.

### 2. Asset Profile

SALOMON SMITH BARNEY A member of citigroup

Asset Value  
Asset Growth Rate  
Income Yield  
Tax Bracket

**\$626,000**

**12%**

**9.0%**

**20%**

7/12/00  
12%  
8%  
20%

### 3. Income Distribution Analysis

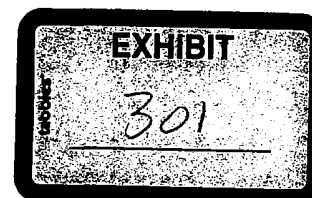
Age	Date	Asset Value	Earnings	Payout	Net Income
51	1999	\$626,000	\$75,120	\$45,072	\$36,058
52	2000	\$656,048	\$78,726	\$45,072	\$36,058
53	2001	\$689,702	\$82,764	\$45,072	\$36,058
54	2002	\$727,394	\$87,287	\$45,072	\$36,058
55	2003	\$769,609	\$92,353	\$45,072	\$36,058
56	2004	\$816,890	\$98,027	\$45,072	\$36,058
57	2005	\$869,845	\$104,381	\$45,072	\$36,058
58	2006	\$929,155	\$111,499	\$45,072	\$36,058
59	2007	\$995,581	\$119,470	\$45,072	\$36,058
60	2008	\$1,069,979	\$128,397	\$96,298	\$77,038
61	2009	\$1,102,078	\$132,249	\$99,187	\$79,350
62	2010	\$1,135,141	\$136,217	\$102,163	\$81,730
63	2011	\$1,169,195	\$140,303	\$105,228	\$84,182
64	2012	\$1,204,271	\$144,512	\$108,384	\$86,707
65	2013	\$1,240,399	\$148,848	\$111,636	\$89,309
66	2014	\$1,277,611	\$153,313	\$114,985	\$91,988
67	2015	\$1,315,939	\$157,913	\$118,435	\$94,748
68	2016	\$1,355,417	\$162,650	\$121,988	\$97,590
69	2017	\$1,396,080	\$167,530	\$125,647	\$100,518
70	2018	\$1,437,962	\$172,555	\$129,417	\$103,533
71	2019	\$1,481,101	\$177,732	\$133,299	\$106,639
72	2020	\$1,525,534	\$183,064	\$137,298	\$109,838
73	2021	\$1,571,300	\$188,556	\$141,417	\$113,134
74	2022	\$1,618,439	\$194,213	\$145,660	\$116,528
75	2023	\$1,666,992	\$200,039	\$150,029	\$120,023
76	2024	\$1,717,002	\$206,040	\$154,530	\$123,624
77	2025	\$1,768,512	\$212,221	\$159,166	\$127,333
78	2026	\$1,821,567	\$218,588	\$163,941	\$131,153
79	2027	\$1,876,215	\$225,146	\$168,859	\$135,087
80	2028	\$1,932,501	\$231,900	\$173,925	\$139,140
81	2029	\$1,990,476	\$238,857	\$179,143	\$143,314

**Totals:**

**\$4,770,472**

**\$2,677,026**

\$300/mth



### 1. Client Profile

**Hugh and Linda Smith**

**Date** 1999  
**Age** 51

The information set forth was obtained from sources we believe reliable, but we cannot guarantee its accuracy. Neither the information nor any opinion expressed constitutes a solicitation by use of the purchase or sale of any securities.

### 2. Asset Profile

**SALOMON SMITH BARNEY** A member of citigroup

**Asset Value** \$626,000  
**Asset Growth Rate** 12%  
**Income Yield** 6.0%  
**Tax Bracket** 20%

### 3. Income Distribution Analysis

Age	Date	Asset Value	Earnings	Payout	Net Income
51	1999	\$626,000	\$75,120	\$37,500	\$30,000
52	2000	\$663,620	\$79,634	\$37,500	\$30,000
53	2001	\$705,754	\$84,691	\$37,500	\$30,000
54	2002	\$752,945	\$90,353	\$37,500	\$30,000
55	2003	\$805,798	\$96,696	\$37,500	\$30,000
56	2004	\$864,994	\$103,799	\$37,500	\$30,000
57	2005	\$931,293	\$111,755	\$37,500	\$30,000
58	2006	\$1,005,549	\$120,666	\$37,500	\$30,000
→ 59	2007	\$1,088,714	\$130,646	\$37,500	\$30,000
→ 60	2008	\$1,181,860	\$141,823	\$70,912	\$56,729
→ 61	2009	\$1,252,772	\$150,333	\$75,166	\$60,133
62	2010	\$1,327,938	\$159,353	\$79,676	\$63,741
63	2011	\$1,407,614	\$168,914	\$84,457	\$67,565
64	2012	\$1,492,071	\$179,049	\$89,524	\$71,619
65	2013	\$1,581,596	\$189,791	\$94,896	\$75,917
66	2014	\$1,676,491	\$201,179	\$100,589	\$80,472
67	2015	\$1,777,081	\$213,250	\$106,625	\$85,300
68	2016	\$1,883,706	\$226,045	\$113,022	\$90,418
69	2017	\$1,996,728	\$239,607	\$119,804	\$95,843
70	2018	\$2,116,532	\$253,984	\$126,992	\$101,594
71	2019	\$2,243,523	\$269,223	\$134,611	\$107,689
72	2020	\$2,378,135	\$285,376	\$142,688	\$114,150
73	2021	\$2,520,823	\$302,499	\$151,249	\$121,000
74	2022	\$2,672,072	\$320,649	\$160,324	\$128,259
75	2023	\$2,832,397	\$339,888	\$169,944	\$135,955
76	2024	\$3,002,341	\$360,281	\$180,140	\$144,112
77	2025	\$3,182,481	\$381,898	\$190,949	\$152,759
78	2026	\$3,373,430	\$404,812	\$202,406	\$161,925
79	2027	\$3,575,836	\$429,100	\$214,550	\$171,640
80	2028	\$3,790,386	\$454,846	\$227,423	\$181,939
81	2029	\$4,017,809	\$482,137	\$241,069	\$192,855
		<b>Totals:</b>	<b>\$7,047,395</b>		<b>\$2,731,614</b>

SALOMON SMITH BARNEY

A member of citigroup

December 15, 1999

Hugh and Linda Smith

## Asset Distribution Suggestion:

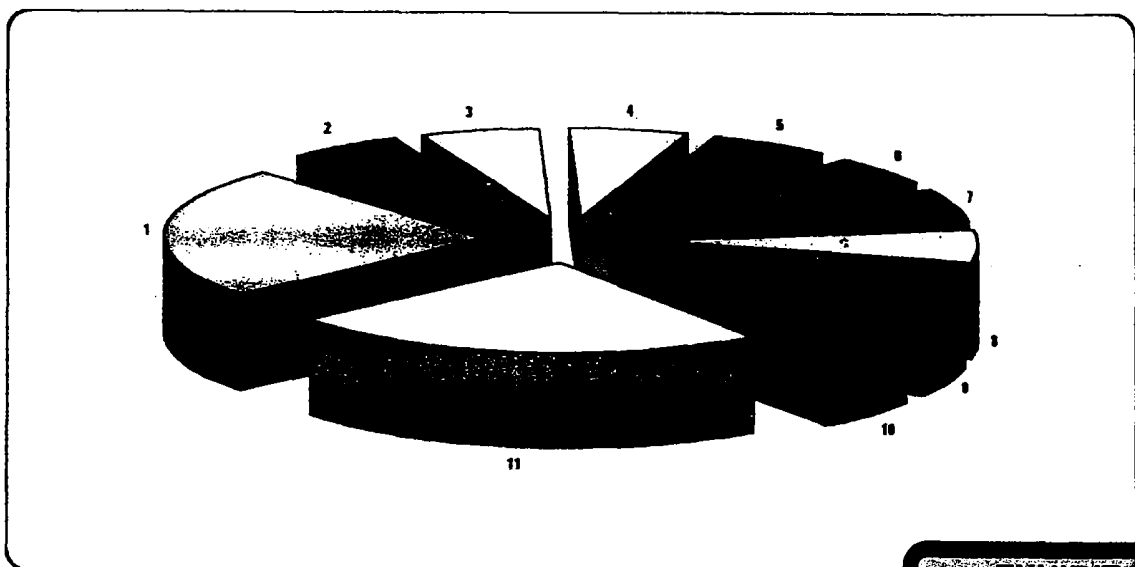
Income Assets: 25%

Growth Assets: 75%

## Hypothetical Asset Allocation

	<u>Investment</u>	<u>Amount</u>	<u>% Value</u>
1	Managed Balanced Account	\$150,000	23.96%
2	Aim Balanced	\$36,222	5.79%
3	Aim Blue Chip	\$36,222	5.79%
4	Aim Value	\$36,222	5.79%
5	Alliance Growth	\$36,222	5.79%
6	Alliance Growth & Income	\$36,222	5.79%
7	MFS Capital Opportunities	\$36,222	5.79%
8	MFS Massachusetts Investor	\$36,222	5.79%
9	Oppenheimer Main Street Gro & Inc	\$36,222	5.79%
10	Oppenheimer Quest Balanced Value	\$36,222	5.79%
11	Managed Growth Account	\$150,002	23.96%
	<b>Totals</b>	<b>\$626,000</b>	<b>100%</b>

## Asset Allocation Diagram



EXHIBIT

302



SALOMON SMITH BARNEY

A member of citigroup

December 15, 1999

Hugh and Linda Smith

## Asset Distribution Suggestion:

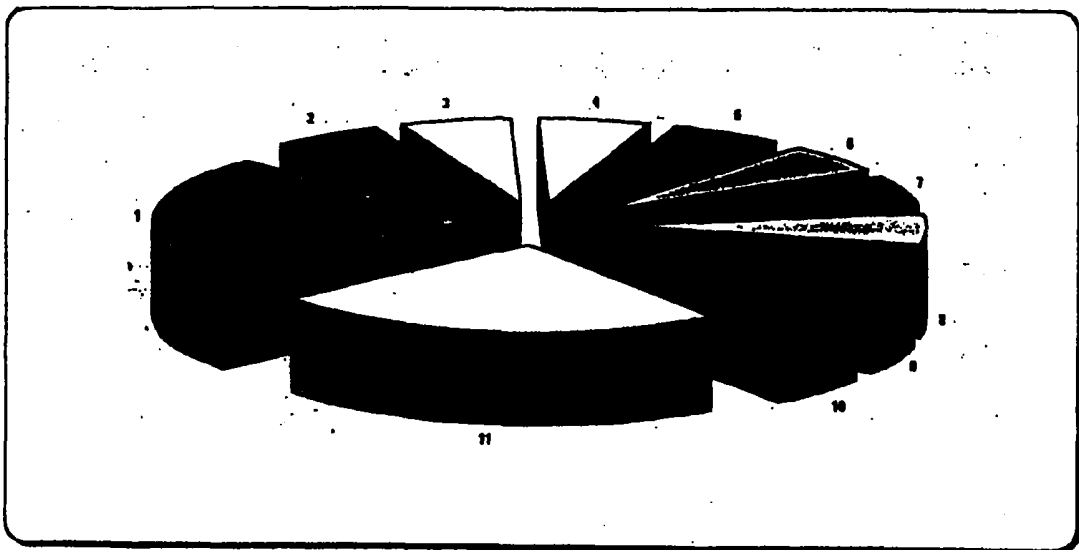
Income Assets: 25%

Growth Assets: 75%

## Hypothetical Asset Allocation

	<u>Investment</u>	<u>Amount</u>	<u>% Value</u>
1	Managed Balanced Account 2.1%	\$150,000	23.96%
2	Aim Balanced	\$36,222	5.79%
3	Aim Blue Chip	\$36,222	5.79%
4	Aim Value	\$36,222	5.79%
5	Alliance Growth	\$36,222	5.79%
6	Alliance Growth & Income	\$36,222	5.79%
7	MFS Capital Opportunities	\$36,222	5.79%
8	MFS Massachusetts Investor	\$36,222	5.79%
9	Oppenheimer Main Street Gro & Inc	\$36,222	5.79%
10	Oppenheimer Quest Balanced Value	\$36,222	5.79%
11	Managed Growth Account 2.1%	\$150,002	23.96%
	<b>Totals</b>	<b>\$626,000</b>	<b>100%</b>

## Asset Allocation Diagram



SSB017128